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FORMING A MUNICIPAL ELECTRIC UTILITY

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You asked about (1) the current statutory requirements for forming a municipal electric utility in Connecticut; (2) issues not addressed in current law; and (3) municipalization statutes in Colorado and other states, particularly with regard to these issues. In addition to Colorado, we discuss the laws in Florida, where there have been recent municipalization initiatives, and California and New Hampshire, which have particularly extensive laws.

SUMMARY

Connecticut law ([CGS §§ 7-213 to 7-233](#)) specifies how a municipality can establish and operate a municipal electric or gas utility. The municipality can buy or lease an existing electric system under these provisions. Creating a municipal utility requires a two-thirds vote of the municipality's legislative body, approval of its chief executive officer, and approval of the voters at a referendum.

Among the issues not addressed under current law are whether a municipality can condemn (take) the property of the electric company currently serving the municipality. The municipalization statutes do not authorize condemnation and it is not clear whether this is allowed under the municipality's general powers. Other issues not addressed in current law include how to value the electric company facilities the municipality

acquires, the steps a municipal utility must take to ensure reliable service, and whether and how a municipal utility can expand its service territory.

The municipalization laws in California, Colorado, Florida, and New Hampshire are significantly different from Connecticut's law. For example, all of them explicitly allow municipalities to condemn electric utility property, for just compensation. California and New Hampshire have procedures for the Public Utility Commission to value the property acquired by the municipality, while Florida's law specifies how juries in condemnation cases must value the property taken by the municipality. California, Colorado, and Florida allow municipalities to franchise private utilities to serve their residents.

CONNECTICUT

Current Law

[CGS §§ 7-213](#) to [7-233](#) (chapter 101) specify how a municipality can establish and operate a municipal electric or gas utility. The municipality can buy or lease an existing electric system under these provisions. These provisions do not allow a municipality to acquire an existing system by condemnation (eminent domain). Instead, if a municipality establishes a municipal utility, the local electric company can require the municipality to buy its facilities. On the other hand, [CGS § 7-148](#) gives municipalities broad condemnation powers, which might permit taking an existing system by eminent domain.

Creating a municipal utility requires a two-thirds vote of the municipality's legislative body, approval of its chief executive officer, and approval of the voters at a referendum. The resulting municipal utility must be administered by a board of commissioners. The municipality can adopt ordinances governing the system's operations and issue bonds to pay for its capital costs. [CGS § 7-222](#) specifies how the utility's rates must be determined.

OLR Report [2011-R-0340](#) describes the statutory requirements for forming a municipal utility in more detail.

In most cases, the sale or lease of an essential part of an electric or gas company's plant or equipment requires the approval of the Department of Energy and Environmental Protection (formerly the Department of Public Utility Control) (CGS § [16-43](#)).

Issues Not Addressed in Current Law

The municipalization provisions were originally adopted in 1893 and have had relatively few substantive changes since then. We have found no case law in this area. The statutes contain a number of archaic provisions. For example, they refer to the “manufacture” of gas, reflecting the fact that when the law was adopted gas was produced by distilling coal. The statutes also specifically apply to plants used to create or distribute gas or electricity “for lighting purposes.”

More importantly, the statutes do not address a number of legal and practical issues associated with municipalization. As OLR Report [2011-R-0340](#) indicates, the law is not clear on whether a municipality can acquire the facilities of an electric company by eminent domain. Nor does it describe how these facilities would be valued, which has been a controversial issue in other states where municipalities have sought to condemn utility facilities.

Current law does not address how an existing municipal utility can expand its service area to nearby towns, although the Groton Utility has done so.

The existing law predates the modern utility industry, which operates on a regional grid. It does not specify how the municipal utility would tie into the grid and cooperate with other utilities in the state. Nor does it address the steps the municipal utility would be required to take to ensure reliable service.

In addition to these state issues, federal law governs the issue of stranded costs. These are costs the utility incurred in serving a municipality that establishes a municipal utility, beyond the costs of the acquired facilities, whose recovery might be jeopardized by the formation of the municipal utility. This can be a contentious issue. For example, in Colorado there is a dispute between Boulder and the electric utility serving the city. The voters in Boulder have recently authorized the city to explore municipalization. The city and the incumbent utility disagree on whether there are any stranded costs. If municipalization goes forward, this issue will be determined by the Federal Energy Regulatory Commission.

CALIFORNIA

Constitution

Article XI, Section 9 allows a city or other municipal corporation to establish, purchase, and operate public works to furnish its inhabitants with power and other utility services. The municipality may furnish those services outside its boundaries, but not in another municipality that furnishes the same service without its consent. Corporations and other entities may establish and operate works for supplying these services under conditions and regulations that the city may prescribe under its organic law (e.g., its charter).

Public Utilities Code

Franchising. Public Utilities Code Sec. 6201 et seq. permit municipalities to franchise electric and other utilities. Section 6262 of the code provides that (1) no franchise granted under these provisions in any way impairs or affects the right of the municipality to acquire the property of the grantee by purchase or condemnation and (2) nothing contained in a franchise may be construed to contract away, modify, or abridge the municipality's right of eminent domain in respect to any public utility.

Acquisition of Utility Facilities. If a (1) municipality has not previously engaged in furnishing electricity or gas to customers on a regular basis or (2) redevelopment agency seeks to finance the acquisition of privately owned facilities of an electric or gas company it must hold an election. The election must be conducted in the same way as one to authorize the issuance of revenue bonds to acquire, construct, improve, or finance an enterprise, e.g., a waterworks system. In the case of an acquisition by a redevelopment agency, the voters are those persons who would be served by the facilities proposed to be acquired.

Municipal Utility Districts. The Municipal Utility District Act (Public Utilities Code Secs. 11501 to 16885) allows one or more public agencies (e.g., a city) to organize and incorporate as a municipal utility district (MUD). The act allows a MUD serving more than 100,000 electric customers to form an electricity district. The formation is subject to approval by the voters of the MUD or electric district.

A district has a wide range of powers, including the provision of electric or other utility services, the construction of utility systems, and issuing bonds. Section 12771 of the code allows a district to take by eminent domain or otherwise acquire real and personal property in or outside the district necessary to exercise its powers.

Sections 13801 through 13932 of the code specify how a MUD can annex another public agency, which requires a hearing by the MUD and approval by the voters of the acquired public agency at an election. Sections 14051 and 14052 specify how a MUD can annex unincorporated areas (the parts of a county that are not cities or districts).

Public Utility Districts. Sections 15501 through 17501 similarly allow resident of an unincorporated area to form a public utility district (PUD). The laws governing PUDs and the district's powers are similar to those for MUDs. In addition, the voters in a PUD can petition the district board to acquire utility works or a utility. The board must obtain estimates of the cost of original construction of the existing facilities and completion by the district of similar facilities. The board may ask the Public Utilities Commission (PUC) to value existing utility facilities for the purpose of submitting estimates of the cost of acquiring them to the district's voters at an election.

If the district can cover the acquisition from its operations, the ballot proposal must specify (1) the cost of the acquisition and (2) how the acquisition would be funded and ask whether the facilities should be acquired upon these terms. On the other hand, if the acquisition would require bonding, the ballot question must specify the amount of bonding and its interest rate and ask whether the bonding should go forward. A two-thirds vote is needed to issue bonds.

Government Code

Acquisition by Cities and Other Local Agencies. Under Government Code Section 54340, a local agency e.g., city, county, or district, may acquire an enterprise by gift, purchase, or eminent domain. Enterprises include electric generation and transmission facilities, among others. Similarly the local agency can acquire any real or personal property, or any interest in or improvement on the property by gift, lease, purchase, eminent domain, or otherwise.

Determination of the Value of Utility Facilities. Government Code Section 1402 et seq. allow a political subdivision to petition the PUC to determine the value of utility property it seeks to acquire. A political

subdivision is a county, city, PUD, or other public corporation. A political subdivision may file a petition when it intends to (1) acquire public utility property by eminent domain or otherwise or (2) submit to its voters a proposition for such acquisition.

The commission must give the utility an opportunity to show cause why it should not act on the petition. Otherwise, the commission must hold a hearing and determine the just compensation the political subdivision must pay the utility for the property.

Within 20 days after the commission does this, the utility may file a written stipulation agreeing to accept the compensation set by the PUC with the political subdivision's governing body. Upon filing the stipulation, the political subdivision must proceed with all due diligence to provide the funding. When the political subdivision pays the compensation, the utility must provide it with the property deed.

If the utility does not file the stipulation within 20 days, the political subdivision must (1) begin a court action (suit) to take the property or (2) submit a proposition to the voters to do so. The political subdivision must act within 60 days after the PUC makes its determination. In the second case, if the voters approve the proposition, the political subdivision must file an action to take the property within 60 days of the vote unless the utility and the political subdivision agree on terms for the acquisition.

The PUC's finding on just compensation is final and may not be modified, reversed, or reviewed by any state court. If the court where the political subdivision pursues the condemnation proceeding decides that it has the right to take the utility's property, the court must enter a judgment in favor of the subdivision fixing the compensation in the amount set by the PUC. If the utility spent money on the property after the PUC made its determination, it can go back to the PUC within 30 days after the court enters its judgment to increase the compensation. Similarly, the political subdivision can go to the PUC in this period if the property's value deteriorated after the PUC made its original finding to reduce the compensation. The PUC's decision on the extent to which the compensation should be adjusted is final.

If the political subdivision does not act within 60 days after the PUC makes its initial determination, the utility can petition the PUC to determine that (1) the political subdivision failed to pursue diligently its rights; (2) its finding as to just compensation is no longer in force; and (3) the utility's reasonable expenditures in connection with the proceedings, which in the PUC's opinion, should be assessed against the political subdivision.

COLORADO

Constitution

Section 1 of Article XX of the state constitution allows the city and county of Denver to build, condemn, purchase, acquire, lease, add to, maintain, conduct, and operate electric and other public utilities. It allows Denver to (1) do everything required in connection with these powers and (2) issue bonds upon the vote of the taxpayers in any amount needed carry out these powers, as prescribed in its charter. Section 6 of Article XX extends these powers to any municipality with a population of 2,000 or more.

Statutes

Franchising. Col. Rev. Stat. § [31-15-707](#) gives the governing board of each municipality the power to (1) acquire electric generation and distribution systems or (2) franchise other parties to develop and operate them. These actions must be approved by the voters in the same ways as the authorization of bonds.

A franchise can run for no more than 25 years. Any initial or renewal franchise must be on the express condition that the municipality may purchase or condemn the facilities at their fair market value, excluding the value of the franchise or right-of-way through the streets. The municipality's action cannot take place within the first 20 years of the franchise without the franchisee's consent. If a municipality wishes to acquire any of the facilities after granting a franchise, it must purchase or condemn all of the facilities within the municipality's limits that are used to serve its residents at their fair market value. On the other hand, the municipality is not required to purchase or condemn any facilities that are obsolete or no longer useful.

If the municipality elects to purchase the facilities and the parties cannot agree on the purchase price, they must enter into a written agreement to arbitrate the matter and abide by the arbitrators' award. Each party must choose an arbitrator to determine their fair market

value. If the two arbitrators cannot agree on the fair market value, they must choose a third disinterested arbitrator and the award of any two arbitrators is final and binding upon the parties.

Acquisition Plan. Col. Rev. Stat. § 31-32-201 requires municipalities seeking to acquire utility property to adopt, by ordinance, an acquisition plan that is approved by the voters in the same way as the authorization of bonds. The ordinance must describe the property to be acquired and the purchase price. It must also describe how the acquisition will be financed by general obligation or revenue bonds. If the acquisition is financed by revenue bonds, all of the utility's operating costs must come from the acquired property. The ordinance may provide for reasonable payments by the municipality into the revenue fund supporting the bonds for services provided to the municipality. These provisions do not apply (1) if the municipality has a contrary charter provision or (2) to condemnations.

The law also allows municipalities to condemn private property for utility purposes in the same way they can condemn other real estate.

Determination of the Value of Utility Facilities. The law does not specify how to calculate the compensation owed to an electric company for its facilities acquired by a municipality. But Col. Rev. Stat. §§ 40-9.5-201 to 40-9.5-207 provides some guidance. It describes the procedure for a municipality to annex land within a cooperative electric association's (co-op) service territory. Just compensation must include:

1. the present-day reproduction cost of the facilities being acquired, less depreciation;
2. the cost of constructing new co-op facilities, necessitated by the municipality's condemnation of the co-op's existing facilities;
3. an annual payment, made for ten years, of 25% of the municipality's revenues from the sale of electric power to customers formerly served by the co-op; and
4. an annual payment, made for ten years, of 5% of the municipality's revenues from the sale of electric power to customers within the annexed territory acquired following annexation.

FLORIDA

Municipalities in Florida broadly derive their power to form municipal utilities from the home rule authority provided in Article VIII, Section 2 of the state's constitution. Although the law does not specifically authorize municipal electric distribution systems, Florida's courts ruled that providing electricity is a legitimate municipal purpose (*Saunders v. City of Jacksonville*, 157 Fla. 240, 25 So. 648 (1946)).

According to the Florida Municipal Electric Association, the state's 35 municipal electric utility companies serve roughly 3 million customers. They are subject to all of the state's laws regarding public bodies, including those on open meetings, open records, and public bidding.

Franchises

Unlike Connecticut, Florida allows its municipalities to grant franchises to private companies that provide utility and other public works services (Fla. Stat. ch. 180.14). The law limits these franchise agreements to 30 years in length. Many franchise agreements include provisions allowing a municipality to purchase the franchised utility's property when the agreement expires. South Daytona, Florida's recent municipalization of its electric system occurred under these circumstances.

If a municipality does not renew a utility's franchise, Florida law allows the utility to request that the municipality buy all of its property and equipment necessary to provide its services. If the parties cannot agree on a price, the law requires it to be determined by a three person arbitration board. If the board fails to agree on a price, the municipality can begin eminent domain proceedings (Fla. Stat. ch. 180.16).

Eminent Domain and Valuation

Florida law allows municipalities to exercise eminent domain for reasons "connected in anywise with the public welfare or the interests of the municipality and the people thereof" (Fla. Stat. ch. 166.411). The state's eminent domain laws also specifically allow property taken by eminent domain to be conveyed to a public or private utility providing electricity services (Fla. Stat. ch. 73.013).

Article X, Section 6(a) of the Florida Constitution provides that no private property should be taken "except for a public purpose and with full compensation therefore." State law specifies that juries determining

compensation for an electric utility property taken under eminent domain must consider (1) the reproduction cost of the property being taken, less depreciation; (2) the going concern value; and (3) any damages caused by the taking if less than the entire property is being appropriated (Fla. Stat. ch. 73.0715). In general, the reproduction cost is the cost of replacing the property at current prices and the going concern value is a property's income producing value beyond its material value.

Public Service Commission Jurisdiction

In contrast to Connecticut, Florida law gives its Public Service Commission (PSC) wide jurisdiction over municipal electric utilities. In Florida, the law provides PSC with authority over municipal electric utilities to:

1. prescribe a rate structure;
2. plan, develop, and maintain a coordinated power grid throughout the state to assure adequate and reliable energy;
3. require conservation and reliability standards within a coordinated grid, for operational and emergency purposes;
4. approve territorial agreements between various utilities;
5. resolve territorial disputes; and
6. prescribe and enforce safety standards for transmission and distribution facilities (Fla. Stat. ch. 366.04).

Expanding Service Beyond Municipal Borders

Florida law allows municipal utilities to expand and provide services to other towns or property owners outside the municipality's corporate limits, subject to any terms and conditions agreed to by the parties (Fla. Stat. ch. 180.19).

NEW HAMPSHIRE

Acquisition of Utility Facilities

New Hampshire allows any municipality (city, town, or village district) to take, purchase, or otherwise acquire and operate suitable plants to generate and distribute electricity for (1) municipal use, (2) for use of its inhabitants and others, and (3) other purposes as may be permitted by the state PUC (N.H. Rev. Stat. Ann. 38:3).

For a city to take these actions, the city council must approve them a two-thirds vote and this vote must be confirmed by a majority of the voters at an election held within one year of the council's vote. In the case of a town or village district, the action must be approved by two-thirds of the voters in an annual meeting.

Within 30 days of confirming the vote, the municipality's governing body must notify any utility engaged in generating or distributing electricity in the municipality and ask it whether it will sell its property there and any property outside of the municipality that the public interest may require the municipality to purchase.

The utility must reply within 60 days. If it agrees to sell, it must submit the price and terms it is willing to accept, together with detailed schedules of the plant and property it proposes to sell to the municipality, in and outside its boundaries city. The governing body may then negotiate and agree with the utility on the price. But the agreement is not binding until ratified by a vote of the governing body held within 90 days of the filing of the reply of the utility.

If the utility does not reply within 60 days, it forfeits the right to have the municipality purchase its plant and property. The municipality may then construct a utility plant or take the utility's property by condemnation, paying just compensation, after obtaining a determination from the PUC that this is in the public interest. The PUC determines just compensation in a proceeding under N.H. Rev. Stat. Ann. § 38:9.

PUC Determinations

If the (1) city and the utility cannot agree on a price; (2) governing body fails to ratify the purchase agreement; (3) municipality and utility cannot agree on how much, if any, of its property outside the municipality needs to be purchased; or (4) schedules of the property submitted by the utility are not satisfactory, the municipality or the utility can petition the PUC for a determination of these questions.

After notice and hearing, the PUC decides the matters in dispute. When required to fix the price to be paid for the utility's property, it must also determine the amount of damages, if any, caused by the severance of the plant and property to be purchased from the utility's other property (N.H. Rev. Stat. Ann. § 38:9).

In the case of electric utilities, damages are limited to the value of the plant and property acquired and the cost of direct remedial requirements, such as new connections to transmission lines. The calculation must exclude consequential damages such as stranded investment in generation, storage, or supply arrangements. These matters are generally in the jurisdiction of the Federal Energy regulatory Commission (FERC). Under N.H. Rev. Stat. Sec. 38:33, in cases where FERC grants the state jurisdiction in these matters, the PUC must (1) determine, to a just and reasonable extent, the consequential damages resulting from the purchase of the plant and property from a utility and (2) establish an appropriate mechanism to recover these damages. The PUC does not need to do this when the municipality and utility agree upon the sale of the utility plant and property.

Within 90 days of the final determination of the price to be paid for the plant and property and any consequential damages, the municipality must decide whether or not to acquire them at this price.

Expansion

A municipality that has an existing municipal utility may expand it or purchase or take all or part of a utility's facilities to expand it. This action does not require a further vote by the governing body but must be approved by the PUC as being in the public interest (N.H. Rev. Stat. Ann. § 38:12).

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